IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

SECOND APPEAL NO. 296 OF 1988

Tukaram Govind Patil.
(since deceased by his heirs)
1. Smt.Akkatai Tukaram Patil,
Age: 70 yrs., Occ.: Household.
(since deceased by her heirs)
1A(I) Dattatraya Tukaram Patil.
Adult, Occ.: Service.
1A(II) Chandrakant Tukaram Patil,
Adult, Occ.: Agriculture.
2. Dattatraya Tukaram Patil,
Age: 39 yrs., Occ.: Service.
3. Chandrakant Tukaram Patil,
Age: 30 yrs., Occ: Agriculture.
All r/o. At: C Ward, 2973,
Shaniwar Peth, Kolhapur. ... Appellants.

Versus.

Suresh Bapusaheb Ingale. .... Respondent.

Shri P.D.Dalvi for the Appellants.

Shri S.M.Kamble for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 28th April, 2005.

ORAL JUDGMENT.

1. Heard the learned Counsel appearing for the parties. The Second Appeal was admitted on 27th February 1989 by passing the following order:

> "Admitted, the substantial question of law being whether the Defendant's tenancy is

revived once the mortgage is redeemed?"

I have heard the learned Counsel appearing for the parties on the above substantial question of law framed in this Second Appeal.

2. The Second Appeal is by the original Plaintiff. The Respondent is the original Defendant. The case of the original Plaintiff is that on 4th May 1971 he executed a deed of mortgage by conditional sale in favour of the Respondent-Defendant. The period of mortgage was for 5 years for a consideration of Rs.4000/-. The case of the Appellant/Plaintiff is that as per the oral agreement between the parties, the Respondent took possession of the suit land in May 1970 and constructed a temporary shed therein. The Respondent commenced garage business in the said shed. The case of the Appellant is that he was ready and willing to pay a sum of Rs.4000/- to the Respondent since May 1975. It is the case of the Appellant that in the deed of mortgage the recitals regarding tenancy of the Respondent were incorporated by practicing fraud. The Appellant issued notice dated 16th September 1976 calling upon the Respondent to redeliver possession of the land by accepting a sum of Rs.4000/-. As the notice was not complied with, suit for redemption of mortgage was filed.

3. The Respondent contested the suit by contending that he was inducted in the suit agricultural land as tenant in the year 1969. He denied that the transaction between the parties was in the nature of mortgage. According to the Respondent, the transaction was an absolute sale.

4. The trial Court decreed the suit. The trial Court also directed delivery of possession.

5. An appeal was preferred by the Respondent/ Defendant. The Appeal has been partly allowed. The Appellate Court held that on the date of execution of the mortgage, the Respondent was tenant in possession of the suit agricultural land and as there was no surrender of tenancy, the Appellant was entitled to only symbolic possession on redemption of mortgage.

6. Shri Dalvi appearing for the Appellant submitted that on the suit land the Respondent has constructed a shed which is being used as a garage. He submitted that there was no material on record to show that the Respondent was an agricultural tenant on the date on which the mortgage was executed. He submitted that it was crystal clear from the deed of mortgage that on the

redemption of mortgage the Appellant was entitled to possession of the suit land. He, therefore, submitted that the terms of the deed of mortgage make it clear that the tenancy rights of the Respondent were extinguished. He placed reliance on the Judgment of the Apex Court reported in (1984) 4 S.C.C. page 382 (Gambangi Applaswamy Naidu & others v/s. Behara Venkataramanayya Patro & others).

7. Shri Kamble appearing for the Respondent submitted that the Respondent was a tenant and the tenancy was governed by the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. He submitted that unless there was a surrender of tenancy by following the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948, (hereinafter referred to as the said Act of 1948) decree for actual physical possession could not have been passed by the trial Court. He, therefore, submitted that the Appellate Court was justified in passing a decree by delivery of symbolic possession.

8. I have considered the rival submissions. It is not in dispute that the suit land is an agricultural land. So far as the nature of transaction is concerned, there are concurrent findings recorded by the Courts below that the transaction was in the nature of mortgage by

conditional sale. It will be necessary to refer to the document of mortgage which is on record. There is a clear recital in the said document at Exh.58 that the Respondent was in possession of the suit land as a tenant. It is contended by the Appellant in the plaint that the said recital was incorporated by practicing fraud. It is obvious from the findings recorded by the Courts below that the so called fraud is not established by the Appellant. The Appellate Court has recorded a finding that there was no substance in the plea of fraud. The Appellate Court by an elaborate finding has held that the parties cannot go behind the terms incorporated in the deed of mortgage. The Appellate Court, therefore, accepted that on the date of execution of the mortgage, the Respondent was in possession as agricultural tenant. The Appellate Court held that considering the provisions of sections 15, 29, and 32(G) of the said Act of 1948, it was necessary for the Appellant to prove that there was a valid surrender of tenancy.

9. The Apex Court in the case of Gambangi Applaswamy Naidu (supra) has considered this question. The Apex Court held that there can be no merger of lease and mortgage even though two transactions were in respect of the same property. In paragraph 5 of the said Judgment,

the Apex Court held thus:

> "5. In our view there can be no merger of a lease and a mortgage even where the two transactions are in respect of the same property. It is well-settled that for a merger to arise, it is necessary that lesser estate and a higher estate should merger in one person at one and the same time and in the same right and no interest in the property should remain outstanding. In the case of a lease, the estate that is outstanding in the lessor is the reversion; in the case of a mortgage, the estate that is outstanding is the equity of redemption of the mortgagor. Accordingly, there cannot be a merger of a lease and a mortgage in respect of the same property since neither of them is a higher or lesser estate than the other. Even if the rights of the lessee and the rights of the mortgagee in respect of a property were to be united in one person the reversion in regard to the lease and the equity of redemption in regard to the mortgage, would be outstanding in the owner of the property and accordingly, there would not be a complete fusion of all

the rights of ownership in one person. This position in law as explained by the Bombay High Court in Narayan Dongra Shetty v/s. Ramchandra Shivram Hingne, has been fully approved by this Court in Shah Mathuradas Maganlal and Co. v/s. Nagappa Shankarappa."

10. Shri Dalvi has placed heavy reliance on a clause in the deed of mortgage which provides that on payment of mortgage money, possession is to be restored to the Appellant. The admitted position between the parties is that the suit land is an agricultural land. It is admittedly recited in the document that the Respondent was an agricultural tenant. The Appellant/Plaintiff who is heavily relying on the deed of mortgage for establishing surrender of tenancy by the Respondent cannot be permitted to read only one particular recital in the agreement which is allegedly incorporated by fraud which is not established. Apart from this, there is a finding of fact on this aspect regarding existence of tenancy as the existence of tenancy is admitted by the Appellant in the document itself.

11. If these are the established facts, it is not the case made out by the Appellant that by following the procedure established under the said Act of 1948, there

was surrender of tenancy. In this view of the matter the Appellate Court modified the decree passed by the trial Court and directed that only symbolic possession will be handed over to the Appellant on redemption of mortgage.

12. I find no error in the view taken by the Appellate Court. There is no merit in the Appeal. The Appeal is dismissed with no order as to costs.

Judge.